UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITES STATES OF AMERICA	)	
	)	
	)	
	)	
vs.	)	NO. 1:09-cr-10382-DPW-1
	)	
	)	
ALBERT GONZALEZ,	)	
	)	
Defendant.	)	
	)	
	)	

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

SENTENCING HEARING
MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Friday, March 26, 2010
2:38 p.m.

Brenda K. Hancock, RMR, CRR
Official Court Reporter
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ALSO PRESENT:

U.S. PROBATION OFFICE
JENNIFER D. SINCLAIR, SR. U.S. PROBATION OFFICER

(The following proceedings were held in open court before the Honorable Douglas P. Woodlock, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Courtroom 1, Boston, Massachusetts, on Friday, March 26, 2010):

THE CLERK: All rise.

(The Honorable Court entered the courtroom at 2:38 p.m.)

THE CLERK: This is the matter of the United States versus Albert Gonzalez, Criminal Action 09-10382.

THE COURT: Well, a couple of things. Let me start to be sure that I have got all the materials that the parties wanted me to have.

I have the Presentence Report as revised on March 17th; I have the Probation Memorandum concerning the sentence that was imposed by Judge Saris dated March 25th; I have two packages of letters from Probation, one on March 22nd, one on March 23rd; I have Mr. Gonzalez's Sentencing Memorandum; and I have the Government's Sentencing Memorandum.

Are those the materials that I should have from the parties on the merits here?

MR. HEYMANN: Yes, your Honor.

THE COURT: Now, there is a preliminary issue with respect to the question of Company A and Company B being entitled to some sort of protective order under the Victims'

Rights Act, and I want to be clear that I have this right. I am referring to paragraph 43 of the Presentence Report.

I will read it to be sure that I have the circumstances correctly. "Company A is a major national retailer that processed credit card payments through its computer networks. On or about October 23rd, 2007, the group, meaning the group of which Mr. Gonzalez was a part, victimized Company A by initiating an SQL injection attack and placing malware on Company A's network. The evidence revealed that Mr. Gonzalez and another breached Company A's computer network, and that on November 6th, 2007 Mr. Gonzalez subsequently transferred a file containing information taken from Company A during the attack to the Ukrainian server."

There is a little bit more detail with respect to Company A.

With respect to Company B, it is reported that "Company B was a major national retailer which processed credit and debit card payments through its computer network. In or about January 2008, Gonzalez and another breached the computer systems of Company B through an SQL injection attack that resulted in the placement of malware on its network. Forensic analysis reflects that Gonzalez was working with data stolen from Company B less than three weeks prior to his arrest."

Now, I note that the defendant, in his version of the offense, makes reference to the assertion that each of those

companies, Companies A and B, have represented that they believe that any intrusions into their computer networks -- and now I am reading from paragraph 85 -- into their computer networks did not result in the taking of any customer data or any risk of harm to their respective customers.

I want to be sure I am understanding what that means.

So, Mr. Heymann, I guess I want to understand, does the Government take issue with the defendant's version here? There does seem to be, at least it is not disputed, that there was an intrusion. It is disputed, apparently, that there was the taking of customer data and then the question of risk of harm as well.

MR. HEYMANN: I think it's at that last step, your Honor, that there is a dispute between the parties. The Government does not have independent evidence that any credit or debit card number was exfiltrated, was taken from either Company A or Company B --

THE COURT: Well, what does it mean --

MR. HEYMANN: -- but put at risk.

THE COURT: -- in the Presentence Report to say that Mr. Gonzalez subsequently transferred a file containing information taken from Company A during the attack to the Ukrainian server?

MR. HEYMANN: I'm sorry. I think I spoke overly broadly. The Government does not have any evidence,

independent evidence, that credit or debit card account numbers, which was the object of the conspiracy, were taken out of either Company A or Company B. It does believe and does contend that those companies were put at risk by the fact that there were intrusions into those networks and, in fact, as the Court has noted, files were taken out.

THE COURT: But these are not track 2 files?

MR. HEYMANN: These are not track 2 files.

THE COURT: Mr. Weinberg, do you dispute any of that?

MR. WEINBERG: I do not, your Honor.

THE COURT: Okay.

Well, I do have, as I said, from Company A and Company B, a request for a protective order under the Crime Victims' Rights Act. I do not know if counsel are present for Company A or Company B here.

UNIDENTIFIED VOICE FROM AUDIENCE #1: Your Honor, counsel for Company A is here but does not wish to be heard unless you --

THE COURT: Okay.

UNIDENTIFIED VOICE FROM AUDIENCE #2: Your Honor, counsel for Company B, lead counsel, has stepped out, but I can go grab Attorney Clements, if you need him.

THE COURT: All right. Well, let me frame it for you. I am going to have to be persuaded that, in light of the agreement that there was an intrusion and that some data was

taken, that I should continue a protective order. It seems to me that, under the circumstances, while they may not be a victim in the sense of having been subject to loss, they probably can be considered to be a victim for having been exposed to an intrusion. More than that, it seems to me that the fact of the intrusion, which is not disputed by either of the parties, should be made public as to each of those companies.

So, in the absence of counsel -- I will take it up at a later point -- but I just want you to understand where I am going now, and you may want to reconsider whether or not you have got anything to say, and when Mr. Clements comes back in the room, you may want to consult with him about it, and we will take up the question of whether or not I continue that.

But my view, I think, is that, unless persuaded otherwise, that I am going to deny the motion for protective order and seal, and that I will unseal the motions themselves of the two companies and the Government's response, which were previously sealed, and that I would list on the restitution the precise names of Company A and Company B with "zero" as restitution.

Now, one further point. With respect to restitution, we are really only talking about Hannaford, right?

MR. HEYMANN: Heartland, your Honor.

THE COURT: I mean Heartland. Excuse me.

MR. HEYMANN: Yes.

THE COURT: But they are the only ones who have asked for restitution. But I think that I would list on the restitution the victims and the question of restitution, although I think that, with respect to the question of restitution as to Heartland, that I also am going to not delay trying to figure out exactly what it is before entering judgment here but have a further hearing.

I think Judge Saris, as I understand it, at least from the memorandum of Probation, that Judge Saris has put off the question of precise restitution for some date in June. Is that right?

MR. HEYMANN: She has, your Honor, and the questions that underlie them, underlie the three cases, are common questions, and Mr. Weinberg and I have not had a chance to speak about the issue after the hearing yesterday.

THE COURT: Right. Well, I am simply going to put that over. I am not going to take time to deal with that issue right now.

Now, let me understand, as well, the Government's position with respect to role in the offense for this particular case. I recognize that I have got a joint Presentence Report, effectively. Mr. Weinberg seeks, I think, a minor role. I do not know what the Government seeks.

MR. HEYMANN: Your Honor, the Government also objected

to the role enhancement in this case. The Government believes, and contends that Hacker 1, Hacker 2 and Albert Gonzalez were all equals and should be treated as equals with no role enhancement for Mr. Gonzalez in this case.

THE COURT: In the case of Mr. Gonzalez as a facilitator of the activities of Hacker 1 and Hacker 2? Is that, basically, it?

MR. HEYMANN: Yes. That, basically, it's that they were each facilitating each other's activities. Sometimes one was scratching the other's back; sometimes it was vice-versa, but that is activity among peers and not hierarchical activity.

THE COURT: With respect to --

MR. HEYMANN: With respect to the activity that the Court is sentencing today.

THE COURT: On the case before me.

MR. HEYMANN: On the case before you.

THE COURT: Now, with respect to that, is there any evidence that Mr. Gonzalez received any financial benefit for the activity before me today?

MR. HEYMANN: No, your Honor.

THE COURT: What was the nature of the *quid pro quo*, if there was one; just friendship, association? What?

MR. HEYMANN: The nature of the *quid pro quo* was, on occasion -- and let me take it in several steps here, if I may. As I will argue to the Court later, these were three elite

hackers that were all in the business of stealing credit cards and debit cards from different entities. They talked all the time. When one of them ended up in trouble, they were sort of befuddled by how to continue the attack, they would get advice from the other. When they needed to have, as in the case of the servers, hacking platforms and secure places to store malicious software and data, they would share it with each other, they would produce it with each other.

So, they were not concerned on an individual, case-by-case basis about moving money from one place to another, because each were doing their own intrusions, each were benefiting financially from those intrusions. And in the case of Mr. Gonzalez, what we know from yesterday, he had $1.1 million in his backyard already.

THE COURT: But is the thrust of what you are saying that the cases parse the relationships in a way that means that, if we focus simply on the activities that will give rise to the conviction in this case, there will not be a specific financial benefit to Mr. Gonzalez, but that Mr. Gonzalez, through his relationship with others involved in this case, obtained a financial benefit?

MR. HEYMANN: That his goal in this or the opportunity that was created by his relationship with these others was to succeed at intrusions which would benefit him on some occasions, just as he was helping them in intrusions that would

benefit them on other occasions.

THE COURT: And only fortuitously it did not benefit him in a financial way with respect to these?

MR. HEYMANN: That is correct. It is a snapshot in time that led that not to happen.

THE COURT: All right. Well, I think my view -- well, I should hear from you, Mr. Weinberg. I am not sure that I see this as a minor role or minimal role, but if you want to --

MR. WEINBERG: Well, I think the problem is the segregation of this case. The principal criminal conduct in this case involved Heartland, Hannaford's and 7-11. As to those activities, Mr. Gonzalez was simply a facilitator and no more. In other words, he was not involved in the computer intrusions, in the hacking, in the injection. That was exclusively done by Hackers 1 and 2. He did not receive, whereas others did, the results of those intrusions.

In other words, there's claims by some or more of those three entities that they had losses, that, in fact, there was the exportation of credit and debit data. It did not go to him. The Government knows that. They've done an exhaustive search of his servers and different of his other computers.

THE COURT: But this is not true of Company A and Company B.

MR. WEINBERG: Company A and Company B, there was --

THE COURT: There was no harm or loss, but there was

data that went to him.

MR. WEINBERG: There was a small fraction of data that was not the data that was the goal of the conspiracy, which is credit and debit track 2 information. None of that went to him, and, as a result, none was sold by him. The Government has the computers of the person who received that kind of information that was at the heart of the Judge Saris cases.

So, I think that if you focus on the criminal conduct in this case, and the principal conduct, again, is the conduct where these intrusions went farther than just the beginnings of a breach, they went to the level of harm, and separated out from the retail intrusions that Mr. Gonzalez participated in, ten of them were before Judge Saris. Company A and Company B almost fall within that grouping. It's the same kind of activity, whereas the processer conduct and the Hannaford and 7-11, which is done almost exclusively by Hackers 1 and 2, as to those, that criminal conduct, which I don't deny is significant conduct, but I think it is at an eloquent difference from the kind of conduct that made him a plus 4 yesterday, and I think that he is an appropriate person for a minus 2, if not a minus 4.

THE COURT: All right.

MR. HEYMANN: Your Honor, I'm sorry. If I may just address one point there.

As you have heard, there is no dispute here that his

role here is very different than his role was in the TJX and Dave & Buster's cases, for lack of a better shorthand. But he did take a far more principal role in two of the charged victims here, Company A and Company B. He happened to have a lesser role in the other three.

But this was all part of a separate conspiracy. It involved different kinds of means, SQL injection attacks as opposed to wireless attacks, and that's why the Government contends that it all should be a neutral plane.

THE COURT: Well, I guess my view on this, because I do want to calculate the guidelines for this case directly, is that I will not enhance his role in the offense here but take out the enhancement that I guess is at paragraph 109, because I do not find that in this case his role should be enhanced, as it was, I gather, in the cases before Judge Saris.

Now, I see counsel for Companies A and B; lead counsel for Companies A and B have come back in.

I think I mentioned to your colleagues my provisional view, but before I act on that view, if there is something further that you want to raise, I will be glad to hear from you, Mr. Ricciuti and
Mr. Clements.

MR. RICCIUTI: Michael Ricciuti, for Company A.

I'll be brief, your Honor. I know you have seen our memorandum.

Your Honor, I understand the Government's position in this case. I think Company's A position can be summarized very briefly. There's only one victim under the Statute 3771 with respect to Company A's breach. That's Company A and Company B, for that matter.

There are no consumer victims. There's no other victim under the statute who has a statutory right to privacy for which the Government has an obligation.

THE COURT: Well, is there a privacy right for a corporation? Certainly not in Massachusetts and certainly not in New Jersey.

MR. RICCIUTI: As a victim, your Honor, there would be.

THE COURT: Well, you are saying that there is a privacy right that inheres in the statute itself, but it does not exist in Massachusetts. There is no privacy right for a corporation in Massachusetts who could not bring a right of privacy action, nor I think could it in New Jersey. I have not spent time thinking about what happens in Plano, Texas. But, in any event, it would only be one of these -- I guess it is in the air now -- personification of corporation kinds of metaphors that lead us to this.

MR. RICCIUTI: I'm not sure that's entirely accurate, your Honor. You are right to say that under state law and federal law there would be no free-floating right of privacy

for corporations.

THE COURT: Or even when ballasted by a statute, a state statute.

MR. RICCIUTI: That might be correct as well, your Honor. But if you look at two points that I think indicate that here there is a privacy right. First, that Congress defined "victim" broadly enough to include a corporate victim. There is no indication in the statute that Congress looked to limit what a victim's right to privacy would be under the statute.

THE COURT: All right. But if I deal with it there, then it is a matter of discretion for me, right, whether or not the victim is to be protected in some way or needs the protection of the Court?

MR. RICCIUTI: I don't believe so, your Honor. I think that the way that the statute is crafted, if you are a victim under the statute, you have a right to privacy, and the government has an obligation to protect it. There's nothing to indicate that Congress --

THE COURT: Where do I find that?

MR. RICCIUTI: That's 3771(e), your Honor.

THE COURT: Well, that is the definition.

MR. RICCIUTI: Yes, your Honor.

THE COURT: Where is it that says that it is a categorical right that the Court must observe?

MR. RICCIUTI: Your Honor, that the right to privacy would be 3771(a)(8).

THE COURT: "The right to be" dealt with -- "treated with fairness and with respect for the victim's dignity and privacy."

MR. RICCIUTI: Correct, your Honor. And 3771(c)(1) would be the Government's obligation to protect that right.

THE COURT: Right.

MR. RICCIUTI: There is nothing to indicate that Congress --

THE COURT: But that is not an obligation, is it, the obligation in the sense that I am obligated to implement that in some particular way, like with a protective order?

MR. RICCIUTI: I think that's fair, your Honor, but I think it does reflect Congressional intent to protect the privacy of victims. And as we have outlined in our papers, to the extent that if there were damage to victims, damage to consumers, there might be some state laws that would require disclosure of that to the public. Here, there isn't that.

THE COURT: Why shouldn't consumers and shareholders be aware that it is possible to penetrate the computer systems of Companies A and B?

MR. RICCIUTI: Your Honor, because, under these facts, there is an unfairness here. If this were brought today, if this were a brand-new case, the hacking happened yesterday, I

would have a harder argument. But what happened here is, the hacking happened in 2007. This case was begun in another District, and that District decided, looking at these principles, that the identity of these two companies shouldn't be revealed.

THE COURT: Well, but that is an agreement between an arm of the Government and the defendant, which I am not obligated to observe. It seems to me I have different responsibilities, among them those of transparency in sentencing and also exposing in the course of the sentencing what the extent of the crime was and those who were affected by it if not in the form of harm. What we have here is Company A and Company B being at least vulnerable to SQL injection attacks and successful ones. Now, they just did not turn out to be ones in which, apparently, some consumer funds were taken.

MR. RICCIUTI: But I'm not sure, your Honor, that that distinction doesn't make any difference. In the event that there was some consumer data, we have another set of victims to consider. And the Court's quite right; when there are consumer victims, there is another victim's right to balance against this disclosure obligation.

Here, there's one victim; it's Company's A and B. There's no indication that any data was stolen, and there's no indication that this breach had any damage to anyone else.

Now that we are three years down the road and the Government, for whatever reasons, took the position that revealing the names of these two companies was unfair, Company A and B are now in the position where they are in another District under Rule 20 where they have to explain the Government's reversal in its policy. That's unfair to them.

THE COURT: I should not say it is a matter of indifference. The Government in this District raises it. I do not think they are bound. I do not think there is an estoppel. But, in any event, ultimately it is my responsibility to deal with this. I find nothing unfair about that.

Company A and Company B can say, We have taken the steps that are necessary to protect us from SQL injections in the future. There was no harm to any customer. But it seems to me that this awkward kind of insulation from transparency for a corporation as opposed to, say, a human victim seems odd to me in light of the fact that there is no privacy right. I do not read a privacy right in here for corporations generally, to be perfectly candid. Maybe that is what Congress meant, and perhaps the Supreme Court will decide that if corporations can have a right of speech, they can have a right of privacy, or perhaps not. But, in any event, I am not sure I am bound by that either.

MR. RICCIUTI: I don't disagree, your Honor, you are not bound. I guess what I am trying to point out is that the

Government took a position and in the case that was handled before Judge Saris, as we read the record -- now, we could be wrong -- but when the Government filed its first Rule 12.4 disclosure, it disclosed to the Government -- to the Court, rather -- here are other corporate victims whose data wasn't stolen who are not going to be publicly disclosed.

THE COURT: Yes, but they were not identified in the indictment. Here they are identified in the indictment; they are Company A and Company B. It is one thing for the Government not to pursue particularized claims. It is one thing for the Government not to make reference to loss of other victims, although the Probation Office sometimes finds that.

But here we have got somebody right in the indictment, two people right in the indictment, who managed successfully to convince the United States Attorney in the District of New Jersey and, apparently, the judge in the District of New Jersey that, at least provisionally, there should be a protective order. I am not convinced.

MR. RICCIUTI: I understand that, your Honor. I think, your Honor, that the strongest argument I can make in response to that is, and it goes to back to Douglas Oil, there is a notion that corporate victims in this atmosphere and with a case like this need to be encouraged to come forward and work with the Government.

THE COURT: You mean to tell me that Company A and

Company B would not cooperate with the Government if faced with something like this? I cannot imagine that they would take that as a corporate policy or even suggest that as a corporate policy. Of course they are going to cooperate. There is no incentive that is needed here. There is, apparently, a benefit that is available, at least for some people, in the District of New Jersey, but it is not necessarily available here.

MR. RICCIUTI: What I am saying, your Honor, is, I don't reach the same conclusion, respectfully, as the Court does. I think if there is a notion that whenever you cooperate with the Government you should expect that there is no protection under 3771 for your identity, that is a huge disincentive for corporations to cooperate. They will go to private sources to seal up their breaches and never disclose to the Government and potentially leave consumers at risk. That is a very damaging policy.

THE COURT: That may be so. That is certainly something the Government would have to consider. But here I do not think it was a matter of Company A and Company B coming forward. This was a matter of Company A and Company B being identified as entities whose computer systems were breached. So, we need not, I think, worry about how stouthearted corporations are going to be about coming forward. And the government has to make that calculation all the time in dealing with potential cooperators.

MR. RICCIUTI: But I guess, your Honor, from the Court's perspective, what I am concerned with is a policy that, as a matter of flat rule, says there is no protection under the statute for corporate victims. If you come forward, or, better yet, as the Court quite rightly puts it, if you, when the Government does come a-calling, cooperate, if you don't put up every defense you can think of to protect exactly this kind of disclosure, you are running a risk. That policy, if it's written that large, is, at least in my mind, dangerous. I don't think it's what the statute says.

THE COURT: It overstates it, I suppose, but I do have some considerable difficulty shedding a tear for a corporation.

MR. RICCIUTI: Your Honor, I hear what you're saying, although I think the case would be markedly different if we were starting fresh. The fact that Company A and B were not put on notice that back when this all started that this was a likely result or even a possible result --

THE COURT: So, they could have taken steps to avoid and impede the Government's investigation?

MR. RICCIUTI: No. But they could have certainly taken steps to make public disclosure on their own terms in their own way so that, to the extent there was going to be any public disclosure, they could at least alert the shareholding public who might be alarmed and concerned that there is not cause for alarm.

THE COURT: They have had three years to alert their shareholding public about problems with their security. They have chosen not to, relying, improvidently, on a protective order. But, frankly, I guess it is their choice, and they made it. Now it is my choice to deal with whether or not there should be disclosure of such an entity, and I cannot say that I have found this --

MR. RICCIUTI: Understood, your Honor.

THE COURT: -- compelling at this point.

MR. RICCIUTI: I guess the last point I would make, your Honor, and then I will cede to Mr. Clements, is that ultimately those who will pay the price are the shareholders of these corporations. There's no victims, there's no consumer who will at least rightly be concerned that there is some data that has been stolen because there is no evidence there was any. But the shareholders, the pension plans, the folks that own the stocks of these companies now will pay a price for the company relying on the Government.

THE COURT: What do you mean "pay a price"? That the stock will go down?

MR. RICCIUTI: I think that's quite likely, your Honor. Companies A and B will be --

THE COURT: I guess, then, it is the choices they made about how transparent they were with their shareholders, with the market, generally, about their exposure. Other of these

entities made disclosure fairly promptly about it. Corporations can make whatever choices they make, but ultimately it is their responsibility, not improvident reliance on a matter that is subject to reconsideration by a judicial officer.

MR. RUCIUTTI: I understand, your Honor.

THE COURT: Okay. Mr. Clements.

MR. CLEMENTS: Thank you, your Honor. Ben Clements, for Company B.

I don't want to reiterate what Mr. Ricciuti has said. Company B is largely in the same position as Company A. I would like to, if I could, however, your Honor, respond to some of the interchange.

First of all, we are not here on a Constitutional Citizens United Corporate Personhood argument, not in the slightest.

THE COURT: Well, but it is. It is not Constitutional, of course, it is not Citizens United, but it does fall in this funny area of a corporation being a person except when it is not. It has got Fourth Amendment rights, but it does not have Fifth Amendment rights or rights against self-incrimination. It does not have privacy rights, at least among the jurisdictions with which I am familiar. I do not think there is any jurisdiction in which there is privacy rights to a corporation. So, we deal with this kind of, to use

an anthropomorphic metaphor, hermaphrodite of a business organization. That is what it is. And the question is, does it make any sense, under these circumstances, to keep from disclosure the identity of a corporation which has had its information technology systems breached, another way of saying that they were vulnerable to breach? And I do not understand why one should do that. I can think of -- well, I cannot think of -- but it is only a testament to my lack of imagination that I cannot think of occasions in which perhaps corporations could be subject to some sort of privacy in particular kinds of settings that may involve individuals within the corporation, but I do not see it here.

MR. CLEMENTS: Well, your Honor, the point I was making is, the reason that Company A and Company B have even been identified to the Court by the Government in Massachusetts, not in New Jersey, but by the U.S. Attorney's Office in Massachusetts, is because the Government recognizes that, under the local rule, the corporations are victims, that they are required to identify --

THE COURT: No. It is because they are indicted. It may be that as well, but they are also indicted. They are identified in the indictment itself. Whether under any circumstances I would accept an indictment like this myself, taking the first cut at it, I do not know why I should accept it here. Some corporations get special privileges; they get

not to be identified.

MR. CLEMENTS: Right. Your Honor, the whole issue of -- you referred to the company's decisions. The company's decisions were not made in a vacuum. The company's decisions were made in light of existing statutory obligations and existing understandings reached with the Justice Department. The statutory obligations that apply here in Massachusetts and that apply in the jurisdiction in which my client is located clearly define when a company is obligated to make disclosures about a breach of its security.

THE COURT: It is not prohibited from making disclosure about breach of security, and if the company is concerned about that, then they have to think about it.

The short answer, I think, to this, or to that aspect of the argument, is that companies are about risk and return and evaluation of risk. They make their choices. They make their choices in the face of uncertainty. There is nothing certain about a protective order under these circumstances. So, I guess I cannot say that there has been some breach of a reliance interest that is enduring and not capable of modification.

MR. CLEMENTS: Well, I would respectfully argue, your Honor, there is a reliance issue. And I would point out that the U.S. Attorney here in Massachusetts has said in its papers that, had the company relied on the representations that were

made in New Jersey, then they would agree that the company's expectation that the privacy would be maintained should apply.

THE COURT: Well, that makes two of you, then. But there is a third; that is the Court. It is a little bit like Lincoln's Cabinet. When they took votes, Lincoln would ask, and the vote would come back five to one, with Lincoln being the one. And he would say, "Five to one. The ones have it."

MR. CLEMENTS: I fully understand --

THE COURT: The U.S. Attorney makes a decision; that is fine. But they do not decide what the sentence is going to be, they do not decide what transparency is going to be afforded to papers that are filed in the Court. That ultimately is the Court's responsibility. And while it may not be in the Department of Justice's best interest over the long run to create such uncertainty, I am not sure that I should factor that into my analysis of whether or not it should be publicly available.

MR. CLEMENTS: Well, your Honor, it's not something that is included in the indictment. The indictment lists Company A and B only by those references, "Company A" and "B." Where the Government made representations and the companies relied on them -- and if I could just take one minute to explain what I think is the meaningful and detrimental reliance.

THE COURT: Sure.

MR. CLEMENTS: It is not a question of they wouldn't have cooperated in the absence of that assurance. It is a question of at the time when the company was making the decisions, how do we handle this? Do we need to make a disclosure, should we make the disclosure? Number one, is there a statutory obligation for us to make a disclosure? No, there is not. The reason there is not is because no customer information was taken. There may have been access to their systems, but nothing was taken, and, so, there's no obligation to disclose.

THE COURT: Well, just so I am clear, when you are talking about "statutory obligation," you are talking about duties to disclose under securities laws?

MR. CLEMENTS: Under state laws dealing with compromise of personal information, under Massachusetts, basically, the identity theft law.

THE COURT: Things for which they could be either indicted or the subject of some sort of civil proceeding?

MR. CLEMENTS: You mean, if they were not in compliance?

THE COURT: If they fail to disclose; they say, We do not have to disclose, we do not have to disclose for purposes of securities law, we do not have to disclose for purposes of privacy-compromise law.

MR. CLEMENTS: I don't believe indictment, but, yes;

civil liability if they fail to comply.

THE COURT: Well, there could be indictment for purposes of securities fraud. If there were a material event, it could be.

MR. CLEMENTS: Right.

THE COURT: But putting that to one side, what that means is they were under no obligation to make disclosure generally to the public. That is their calculation. It is not the calculation of what happens when matters are brought to the attention of the Court on which the Court is obligated to sentence.

I started this -- and I guess, perhaps, you were not in the room -- but I started this by making sure that I had here in the Presentence Report an agreement -- as reflected in the Presentence Report -- an agreement that their information technology systems have been compromised in the sense they have been breached by the defendant and his associates.

So, that is what we have here. Those are the facts. It is not just saying they had in their mind Company A and Company B, which would be a different case. This is a case in which they took affirmative actions that are the subject of relevant conduct for me in making a sentence. It seems to me I have an obligation to, unless there is some real, identifiable interest to the contrary, a rape victim, to indicate what it is that I am relying upon in making my decision. And I do not

rely upon unidentified and unnamed victims, which is what your client is or purports to be and comes to me as a victim, as a basis for sentencing.

It is much more fundamental than that. It really comes down to the question of, if they are going to evaluate whether or not a judge has acted properly or improperly, you have to know what the judge is acting on. That has to be transparent, in the absence of some very specific kind of compromise of an identifiable cognizable privacy right.

MR. CLEMENTS: Well, the identifiable right that I would point to is, having first made the determination no statutory obligation to disclose, they then consult with the Justice Department that is handling the case. There is an agreement with the Justice Department that the company's identity will not be disclosed, and it is at that point that the company detrimentally relies, because if there was any expectation that there would be a need for or requirement that the identity would be disclosed, the company could have made the disclosure at that time, rather than being in a situation where it could appear to be some sort of foot-dragging, belated disclosure.

And if I could, respectfully, your Honor, with respect to the issue of what the Court has relied on for the decision, as I understand it -- and I'm not party, obviously, to the dispute between the United States and the defendant here --

but, as I understand it, the involvement of the defendant with respect to Company A and Company B makes absolutely no difference, at least to the Guidelines.

Now, I understand the Court, of course, is entitled and obligated to consider all relevant information, but it seems that the involvement of Company A and B as two additional companies whose systems were penetrated but did not in any way impact the conduct that was carried out from there, it seems that the difference that that could make in the overall sentence, given the breadth of the involvement with respect to companies whose information was, in fact, compromised, is so slight that it seems that there is not a real risk that there is a sort of lack of transparency about the sentence if the companies' identities remain confidential as were promised to them by the Justice Department.

THE COURT: Well, I guess there are several levels of response. One, is that it is recited in the Presentence Report. Number two, it seems to me it is the responsibility of the Court to create the record.

People can decide whether or not it was slight or material or insignificant or whatever, but the treatment of victims and the way in which victims are identified in the charging document and in the Presentence Report is a matter that is material, and, in fact, it provides the foundation for Company A and Company B to come here and ask for a protective

order.

You say you are victims. Mr. Ricciuti tells me that you fall within the definition of 3771, which reads, "For purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a federal offense."

Okay. If you are a victim, you are properly within the scope of the Court's evaluation. The Court should be sensitive to real rights of privacy, using that as the generic here. I suppose the Department of Justice should be concerned with being able to offer reliable reliance interests, but that is not my responsibility. My responsibility is to have a transparent sentencing.

So, unless there is something new here, I think we have exhausted this issue.

MR. CLEMENTS: Thank you, your Honor.

THE COURT: Okay. As I indicated, I will unseal the applications for the protective order by Company A and Company B and also the Government's response. And in so far as documents of this Court are concerned, the Judgment of Conviction will reflect the names of the identified victims and illustrate that only one of those victims, Heartland, has sought restitution, which is consistent with the positions of Company A and Company B that they have had no harm done to them here, harm in the sense of loss.

But it seems to me that the exposure of a corporation to compromise of its information systems technology is not insignificant; in fact, it is the foundation for alleged victimization here, and I believe that Company A and Company B should be identified. I have perhaps spent too much time on this, making more of it than I should, should in terms of the argument that both Mr. Ricciuti and Mr. Clements made, which is, in terms of larger significance, it is not the most significant element or one of the modestly significant elements, but it is an element here.

The final point I would make is that there is no privacy interest for corporations. There should not be a privacy interest for corporations. Corporations are these legal congeries. And at the risk of having gone on too long, one of the things that came to ming, as I thought about this, is a speech that the Poet Archibald MacLeish gave to I think it was the 100th Anniversary of the *Harvard Law Review*. MacLeish had been a partner at Choate, Hall & Stewart before he left to go to Paris and start his writing career.

But he recites in that speech, reflecting on his law school career -- talked about the legal conception of the corporate entity, the enchanting fiction that a corporation has an existence of its own distinct from the existence of its employees, its officers and even its owners. It was striking to him, and he says that when he first met that lovely whimsy

in the law school, he embraced it as though it were mine.

And then he quotes a poem that he drafted at that time. I will not read the entire poem, except the last two lines. "The Oklahoma Ligno and Lithograph Company weeps at a nude by Michael Angelo."

It is so absurd to suggest that there is this anthropomorphic quality to corporations and that they are entitled to some special benefits as to leave it open to spoof by poets.

So, the short of it is, I am not going to acknowledge in this context the right to privacy on which a protective order would be appropriate. And the parties, if they choose to, are free to refer to the actual name of Company A and Company B in the course of their arguments here.

So, now, turning back to the question of calculation here of the Guidelines, I understand your position, Mr. Weinberg, that the building block of loss, which drives this thing, is wooden and perhaps not based in any kind of empirical evaluation; it is simply a ready-made structure to construct this sentence. But that is what the Sentencing Commission did, and while I am not bound to follow the Sentencing Commission in the application, I do have to ensure that I have calculated the Guidelines accurately here.

So, is there anything else about the calculation of the Guidelines that you would like me to consider?

MR. WEINBERG: Well, I don't want to burden the Court even if I win --

THE COURT: You are the only lawyer in America who does not want to do that.

(Laughter)

MR. WEINBERG: I want to burden the Court under 3553 and try to achieve for Mr. Gonzalez a certain sentence --

THE COURT: Right.

MR. WEINBERG: -- and not win Pyrrhic victories on guideline calculations that will, nevertheless, end up above a Level 43 and --

THE COURT: Well, I think I understand that; that is to say, I think Judge Saris, at least reading this synopsis of what she did, had the same view, which is, it does not make any difference, really, here, as a practical matter. It might if I said, No, it is really every card constitutes 50 cents; I suppose that might change it. But it is an artificial construct that was developed as a way of creating these Guidelines. But we are dealing here with a guideline that is capped; it is no higher than and no lower than 35 years, 240 months.

Are there any other changes or corrections that you would have me consider in the Presentence Report?

MR. WEINBERG: For instance, because of the Probation Department's decision, and Ms. Sinclair has done yeoman's work

in this very difficult case --

THE COURT: Right.

MR. WEINBERG: -- there is at least one factual statement that I would like to have redacted, and that is on footnote 3, page 6, that says, in essence, that the evidence reveals that Gonzalez and Hackers 1 and 2 gained access to over 100 pieces of credit and debit card and track 2 data that was being processed by Heartland, and it is the corollary of my earlier representations to the Court that I believe Mr. Heymann has not contested that there simply was not any track 2 data, any debit data, any credit data, that was available to Mr. Gonzalez.

THE COURT: So, does it then mean that I strike Gonzalez's name?

MR. WEINBERG: Yes, your Honor.

THE COURT: Mr. Heymann?

MR. HEYMANN: Your Honor, the forensic evidence is that the cards at Heartland payment systems -- that the access to the account numbers was gained after the date of the defendant's arrest, and, therefore, he would not be -- we have no evidence whatsoever -- it may have occurred, but we have no forensic evidence that he, himself, had access to those hundred-million cards, and, therefore, we have no objection to it being stricken.

THE COURT: All right. So, we will strike

Mr. Gonzalez's name from that footnote.

MR. WEINBERG: Okay. I just wanted to preserve my argument that the loss significantly overstates in this case, where he received no profit, accessed no debit or credit cards from the hacking of Hacker 1 and 2, that it is even a more extreme example of how the $500 per card or the loss calculations or intended loss calculations are not correspondent to his particular offense conduct in this particular case as contrasted to yesterday's case.

THE COURT: All right. Thank you. Let me frame the discussion a bit, and the way in which I would like to proceed is to hear from the Government, from Mr. Weinberg, any victims who wish to be heard on the matter and then, of course, from Mr. Gonzalez.

But I have two propositions that I want to consider or want the parties to address themselves to. One, as I said, the Guidelines calculated -- and I think I agree with Mr. Weinberg, in a wooden way it is a way to get to figures, but the use of caps at 43 is an indication that at a certain point you are just creating telephone numbers, not something meaningful. But the Guidelines themselves are 35 years. That is the sentence that would be imposed for the relevant conduct here.

Second, that Judge Saris has already imposed judgment with respect to aspects of the relevant conduct, although I understand that the Government has preserved, and the

defendant has preserved, the idea that she was not considering the relevant conduct in this case directly.

Nevertheless, I have to say that I find Judge Saris's sentences on their face to be reasonable, and I want to understand what additional delta there is that would cause me to go higher than her sentence or reasons to go lower than her sentence in one of those other cases. It is an awkward aspect of this case that -- or these cases -- that we have a very firm rule with respect to random draw of criminal cases with a purpose of avoiding the potential for judge shopping.

That having been said, it creates a certain awkwardness of having two judges deal with a bundle of relevant conduct, as Judge Saris and I have had to do here. And I would add one further thing; that she and I have not discussed the merits, the substance of sentencing, in any way. I became aware of what happened in her court and what she decided to do by means of the memorandum from the Probation Office. We discussed procedural issues, but not the substance of it, to try to preserve that local rule. This may be an occasion or a precipitant for changing that local rule. I am sure you have a modest interest in that but not right now.

So, with those kinds of touchstones, Mr. Heymann, what is the Government's recommendation, and how does it play into those choices?

I understand the parties have agreed that they are

going to keep it within a range that goes no higher than 25 years, which is 10 years lower than the guideline in this case, and, as I said, it seems to me to be not unreasonable, but now I am going to have to do it in a more specific way.

So, what is the Government's position?

MR. HEYMANN: Your Honor, let me start, if I may, with the Government's recommendation.

THE COURT: Sure.

MR. HEYMANN: The Court should sentence Albert Gonzalez to a sentence of 23 years' imprisonment, to be followed by an additional period of two years, pursuant to 18 U.S.C. Section 3147. The Government has previously argued in its briefing to the Court that it should be 25 years, but I wanted to clearly break out what I think is two separate things that are now before the Court.

THE COURT: Just so I am clear about that, because it is not altogether clear -- although I understand Ms. Sinclair's position on this -- that is how Judge Saris fashioned her sentences; is that right? That is to say, the additional two years was tacked consecutively on top of the substantive claim?

MR. HEYMANN: Well, the 3147 was not before Judge Saris.

THE COURT: There was no --

MR. HEYMANN: There was no 3147 filing. What the two years was was the Aggravated Identity Theft. So, she created a

20-year sentence that was 18 years for all the counts that weren't Aggravated Identify Theft and then two years there. So, what Probation has clearly put out to us is that a 3147 can be imposed on and after that, but it does not require that the 1028A be on and after the Court's sentence here.

THE COURT: Okay.

MR. HEYMANN: I don't think I need to rehearse -- I'm not even sure it would be valuable to rehearse right here that the defendant was -- the details of the -- a lot of the details of the defendant's criminal wave. He was at the center of the largest, most costly series of identity thefts and computer intrusions in the history of prosecution.

But, yesterday Judge Saris sentenced the defendant with respect to one part of it, and there are two additional parts that are separate and distinct that are before this Court right now for consideration.

Judge Saris carefully cabined her analysis and sentencing to what I will loosely and generally refer to as the TJX and Dave & Buster's portions; the TJX case referring, as we have during the course of our colloquy here, to that whole body of wireless attacks on retail networks that stole a lot of credit cards with his organization, the Dave & Buster's case being a variant of that going at a restaurateur; it wasn't wireless but a variant of that going at a restaurateur.

Before this Court is two separate things, two separate

matters that have not been vindicated. One is, there is a totally separate conspiracy that goes on with Hacker 1 and Hacker 2, and we began this proceeding with a discussion of how that conspiracy was very different than the hierarchical corporation that he built to do the wireless attacks that Judge Saris sentenced. And it also has a different structure; it has a totally different set of techniques. It's using these SQL injection attacks, internet attacks to do it. And it has a totally different set of victims. So, there is a separate criminal activity and a separate victim body to be vindicated.

Then, there is on top of that, and not before Judge Saris, because there was no notice filed and it wasn't brought up in the Presentence Report, is the vindication of the Federal Court itself; that he was on pretrial release. Candidly, he was on pretrial release for the entire wave of his criminal activity, but before this Court is a segment that goes from 2006 to 2008, when he is on pretrial release and commits the crimes here.

THE COURT: Let me just be sure I understand, because it is a complex background. He is on pretrial release from the District of New Jersey. There is, I gather, a supervised release violation warrant outstanding, or I do not know where it stands at this point.

MR. HEYMANN: I don't believe it's outstanding anymore.

THE COURT: Let me just be sure I understand this. With respect to all of the cases, this is activity committed while he is on pretrial release, isn't it?

MR. HEYMANN: Yes, your Honor.

THE COURT: So, just that this has an origin in the District of New Jersey does not distinguish this from the other cases.

MR. HEYMANN: That's correct, your Honor. I mean, the short and candid history is, to take the critical building blocks, I think, he gets charged in I believe it's June, it may have been July, of 2003, with Access Device Fraud 18 U.S.C. Section 1029. He is released on pretrial release while he is cooperating in the investigation of crimes with Secret Service. During that period -- that ends sometime in 2007, but during that period he's committing the crimes that are first charged in the cases before Judge Saris and then the cases that are before you.

I was, as the prosecutor, unfamiliar with 3147, did not -- was unfamiliar with it until the charges are, in fact, brought in the District of New Jersey with the necessary notice having been provided, and it having been done in the New Jersey case, there was no reason to duplicate it in the Massachusetts case and in the New York case. So, they do not end up part of the New York and Massachusetts case, and they end up part of the New Jersey case.

So, that's the mechanics of what happens.

THE COURT: Right, but this is also for my general self-improvement. In this District the United States Attorney's Office has not used 3147 as a mechanism for charging?

MR. HEYMANN: I don't know the answer to that. I simply was unaware of the statute. It does not mean that there aren't --

THE COURT: I cannot recall.

Ms. Sinclair, do you know if there are 3147 charges?

PROBATION OFFICER SINCLAIR: I have seen it used before, your Honor. I am not sure it has been done as an actual charge of conviction or just as a notice, but I have seen it applied in the Guidelines and run consecutively on a handful of occasions.

THE COURT: In cases brought in this District?

PROBATION OFFICER SINCLAIR: Yes, your Honor.

THE COURT: But with a 3147 notice?

PROBATION OFFICER SINCLAIR: With notice, yes.

MR. HEYMANN: Okay. So, to answer the Court's, I think, first question, what is before this Court that was different, distinct, un-vindicated, unaddressed, in the earlier proceedings are those two things, a separate body of criminal activity and with a separate set of victims and a separate set of mechanisms, and then the 3147 action of being -- that, in

turn, has a separate reason to vindicate it and a separate reason to address it, which is why it is broken down in the Government's recommendation.

THE COURT: Well, it is more than a separate reason. It is mechanical, effectively.

MR. HEYMANN: Yes.

THE COURT: The question, I guess, for me is whether it has been internalized in the gestalt of Judge Saris's sentence already.

MR. HEYMANN: I cannot speak for Judge Saris.

THE COURT: Was there reference made to it or the fact that he was on supervised release at the time that the offenses in the two Judge Saris cases were handed down? The second issue is, she got the same Presentence Report?

MR. HEYMANN: Yeah. She had the same -- and she had a different Presentence Report, but she did have the same brief which the Government filed in all three cases --

THE COURT: Right.

MR. HEYMANN: -- and which did make reference to it. What I don't know is whether, as she did her analysis, she --

THE COURT: At least, she did not discuss it during the course of her recitation of reasons or in the argument?

MR. HEYMANN: As I recall, she referred at one point to the defendant -- and I don't intend to be making argument in saying this; I am trying to recall the event --

THE COURT: Right.

MR. HEYMANN: -- as having been like a double agent of some form. But I do not recall any discussion beyond that --

THE COURT: And the double agency arising out of cooperation following his initial arrest in 2003?

MR. HEYMANN: Yes, and committing the crime while cooperating.

PROBATION OFFICER SINCLAIR: Your Honor, may I have a moment --

THE COURT: Yes.

PROBATION OFFICER SINCLAIR: -- just to let you know that that enhancement was not applied in Judge Saris's case.

THE COURT: I know it was not formally. What I guess I am saying is that Judge Saris had before her, I believe, the same guideline, 35 years, right?

PROBATION OFFICER SINCLAIR: She did not, actually.

THE COURT: What was her guideline?

PROBATION OFFICER SINCLAIR: Hers was slightly different because she had a higher statutory maximum on the counts of conviction.

THE COURT: So, it was uncapped -- or not uncapped -- but the cap was raised?

PROBATION OFFICER SINCLAIR: There was no actual -- the guideline would have been life, but there was no actual charge that carried life, so the guideline was 207 years, just

because it wasn't -- it couldn't become life.

But the enhancement for the 3147 was not applied in Judge Saris's case because it was not giving notice in Judge Saris's case.

THE COURT: Right. That is a formal issue, I think --

PROBATION OFFICER SINCLAIR: Right.

THE COURT: -- because, for the most part, I think judges generally take into consideration -- not that they are obliged to apply it like an 851 -- but they take into consideration whether or not the defendant is on supervised release or subject to some lingering aspect of a prior sentence before they do this.

So, I guess what I am getting at is, as a formal matter, both you and Ms. Sinclair are right, that if it is not 3147, as an informal matter, I cannot imagine that it was not part of the consideration.

MR. HEYMANN: Again, I can't speak to it because it wasn't articulated.

THE COURT: Right.

MR. HEYMANN: All I know is what was before her, and, as I indicated, that same brief was before her that raised the fact. The fact was in the brief.

Okay. But the second part, then, in a sense to go backwards, is, what is different or what is important about this separate kind of activity.

THE COURT: I think maybe the question is that, but it is a little bit broader than that. It is, what is it that makes this require something more by way of sentence? One can take, I suppose, a geometric approach to sentencing, as aspects of the Guidelines do, or arithmetic, saying, if one crime is bad, then two crimes are twice as bad, and three crimes are three times as bad. But that is not what the Guidelines do, and it is not what anybody with common sense would do.

So, the question is, what is the delta here? Why is there a delta? Why should I go higher, why should I go lower, in light of the larger set of issues that we always have when we are dealing with multiple charges and grouping and overlapping here overlapping indictments by different jurisdictions?

MR. HEYMANN: The delta here, your Honor, I think is twofold, and it has to do with the nature of the evolution of the criminal activity. The first is that there is a delta associated with moving from attacking individual stores to attacking payment processors, to moving from -- To put it in its most simple form, if a customer hears that their card is vulnerable at a particular store, they can simply decide whether they are going to shop there or someplace else. But when it goes at the system itself, when it attacks the system itself, where you can't differentiate in some sense where you are going to shop, it acts like a tremor; you can't move

anyplace because there is nothing -- it is fundamental to --

THE COURT: When you say "attacks the system," you mean a consolidator like Heartland --

MR. HEYMANN: Yes.

THE COURT: -- which does multiple companies as opposed to drive-by hackings through wireless methods?

MR. HEYMANN: Exactly. So, that's number one.

Number two is that it also reflects the evolution of computer crime itself that in a way is frightening and dangerous and needs to be addressed separately.

You can see it -- just to take, again, the defendant as the model, in 2003 he goes up to an ATM, he's gotten some card numbers, he starts taking the money out. In the next step he's become -- there is an organization. It's an American organization. He's the company CEO and COO. He's all the O's and C's up there, running the organization, but it's a structured organization.

In the last step, which is where crime has moved and it is much more dangerous and needs to be addressed separately, you have elite international carders and hackers moving seamlessly across international borders, sharing attack tools, helping each other to build the attacks, providing each other assistance. And they are not worried about honor among thieves. They are not worried about honor among thieves, because, number one, as we discussed, I guess, in the beginning

of this proceeding, sometimes one of them is going to benefit, sometimes another one is going to benefit. They are also not worried about honor among thieves, because what they are using as a basis of communication is a nickname that is often nearly untraceable, the cover of the anonymity of the internet.

So, the crime itself, of which he has participated and moved actively, has moved from a simpler model, one that was addressed before, to this more dangerous, more rich, more fluid model that is, in fact, becoming the model for large-scale internet crime and needs to be addressed separately as being unacceptable and we are going to stop it. Those are the two.

THE COURT: But let me just see if I can unbundle that a bit.

The international quality of this was evident as well, was it not, in Judge Saris's case, and, in fact, the sentence that Judge Wolf imposed?

MR. HEYMANN: Yes, but in a much simpler form, as it were. The gravamen of those offenses were things that were going on in America. Humza Zaman before Judge Wolf; yes, the money was money that had started over in Latvia, but the gravamen of the offense was Humza Zaman flying out to San Francisco, picking up cash from somebody with an Eastern European accent or voice and shipping it back to Gonzalez. It's almost a classic money courier or money shipper event.

With respect to the matters before Judge Saris, if you

looked at where the weight of the activity was, 85 percent of the activity, it's going on in cars and apartments, where there's wireless attacks going on at the businesses. It's going on in the United States. He's having to go outside to get, for example, Office Max's cards decrypted; he did not have the capacity within the United States to do it. He used his network of friends to find somebody who could decrypt those cards outside of the country.

So, there is, by all means, international activity going on there, and it is, by all means, important, but it's not at the core of the offense in the way that it moves to the core -- it's not the way it moves to the core here or it becomes much more fluid here.

THE COURT: Let me ask about the internet dimension of that. How is it different in kind as opposed to degree? I understand you are characterizing the Judge Saris cases as wireless incursions, and this is a more fundamental incursion in a system of -- for lack of a better word, as a financial intermediary for these kinds of credit cards. But is it any different, really, in terms of using the internet?

MR. HEYMANN: The activities in the cases before Judge Saris not exclusively but predominantly relied on physical presence. Not only did they rely on physical presence for the attack, but the organization was among a group of people who knew each other by name, who worked with each other, who had

grown up with each other at times, who had been introduced to each other by friends, who partied with each other.

That is a very different kind of structure and a very different kind of threat than one where it's simply a set of associations that are between spirits, as it were, that could be in any country that were moving information among several countries using compromised basis in ether-space and relying on attack techniques that does not require a physical presence. So, it is moving into the incarnate world.

THE COURT: All right. I think I understand that.

MR. WEINBERG: Thank you, your Honor.

First, if I can address what I think is reason one, that the Government's reliance on the fact of 3147 as a statute was not before Judge Saris. But clearly the Government argued strongly in their brief, page 2, he did so while on pretrial release from an earlier federal case and while intentionally obstructing justice. They have a title on page 6, "Gonzalez Disrespected the Courts and Intentionally Obstructed Justice." There was a feature on page 7, when they talked about him lying and manipulating the federal courts, federal law enforcement, even his own family. And Judge Saris, although I don't recall her specifically addressing the "lied to the Court" clearly as a part of her sentencing reasons, talked about this period of deception, and it was one of the points that weighed against my contention that a 15-year sentence was sufficient and that no

greater sentence was necessary.

Second, in terms of the evolution, Judge Saris's case was saturated with international nexuses and relationships. First, the servers, which are about the only thing or the principal thing he did to facilitate Hacker 1 and Hacker 2 in 2007, was to provide them with access to servers in Estonia, which were leased and which, with the server in the Ukraine, were used to hold either the 40 million or 11 million credit and debit cards that were at the heart of the case before Judge Saris.

Second of all, the Dave & Buster's case, which is the New York case, which was the second of the two cases before Judge Saris, to my understanding was an internet, or remote or not on-the-scenes hack.

Third, is that the Government's principal presentation to Judge Saris -- and they even provided an exhibit of a chat log that went on for perhaps over a hundred pages largely in 2006 between Mr. Gonzalez and a man named Maksym. His computers were first seized in Dubai. He was then arrested with his computers in Turkey. He was a man who, I think, came from Ukraine. He was a person that the case in front of Judge Saris reflected was the principal receiver of the fruits of Mr. Gonzalez's computer intrusions in the ten retail stores, at least one of which I believe, Forever21, was hacked into with an SQL injection.

Fourth, the case before Judge Saris dealt with money laundering, and the government made a particularized presentation that Mr. Gonzalez had skills in moving money through the internet, through e-gold, and, ultimately, the couriers received money from foreign sources. So that it is, I think, not a fair compartmentalization of these two cases as domestic, international, as wireless, SQL.

THE COURT: Let me just stop at Maksym. He is a named defendant in -- is it the New York case?

MR. HEYMANN: The Eastern District of New York case, yes, your Honor, and also, perhaps, the case in San Diego.

THE COURT: Is he a fugitive?

MR. HEYMANN: He was. As I understand it, he was prosecuted in Turkey, received a -- the information on what sentence he received has always been soft, but the reports were 30 years. But I want to be clear that that information has never been fully confirmed by the Government, and, therefore, it's been soft. But he was prosecuted there. As a result, he has not been extradited to the United States. So, as a technical matter, I don't know whether he's a fugitive, but he hasn't been brought before the Courts in either the Southern District of California or the Eastern District of New York.

THE COURT: Okay. And it lists him at page 3 of the Presentence Report as the cases pending with respect to Alexander Suvorov. He was involved in the Judge Saris case,

right?

MR. HEYMANN: He was involved in the Eastern District of New York case. He has pled guilty in the Eastern District of New York.

THE COURT: All right.

MR. HEYMANN: And I want to say that Mr. Weinberg is absolutely correct. It was not, to the best of my knowledge, a wireless attack on Dave & Buster's.

THE COURT: Okay.

MR. WEINBERG: The Government brief, again, strongly put before both Judge Saris and yourself the chat logs with Maksym dating to 2006, dealing with Maksym's receipts of cards. That was in the Judge Saris case and talked about, indeed, as early as 2006 Gonzalez urged his, quote, international payment card fence, Maksym Yastremski, to quickly sell payment card numbers.

In short, your Honor, this is not two compartmentalized and different conspiracies with his somehow being at the heart of a new and more sophisticated and more international, a different conspiracy. He was communicating with Hacker 1 and/or 2 well before the end of the Judge Saris case. And what distinguishes this case, instead, is his minimal involvement as contrasted to the ten, separate computer intrusions that were at the heart of the case before Judge Saris.

THE COURT: And the recommendation is 15 years; is that right? Your recommendation is 15 years?

MR. WEINBERG: Is 17 years, your Honor.

THE COURT: 17 years. Adding -- with the consecutive 3147?

MR. WEINBERG: Yes. And in that recommendation I would ask that the net result of the aggregate sentence be no greater than 20. And I would ask the Court, because of the anomaly that he was arrested in the New York case in May of '08, the Mass. case in September of '08, perhaps August, this case not until September '09, there's 15 real months where he was detained, where he's unlikely to get Bureau of Prison credit. And, therefore, I would ask the Court to consider, if the Court determines that a 20-year sentence sends the message which Judge Saris expressly stated she wanted to send in terms of general deterrence and properly accommodates the positives that she determined about Mr. Gonzalez, to consider a sentence, the aggregate of which would result in a sentence 15 months less than the 20-year concurrent.

I am concerned that the Bureau of Prisons will find that his detention was on Mass. and New York and, therefore, begin whatever sentence your Honor imposes and only give him credit to the date of his arrest on the New Jersey case, which was deep into '09. I am not an authority on how they impose credits. I know they do it. It's like the designations of

prisons.

THE COURT: No; that I know.

Ms. Sinclair, do you know what is going to happen with something like this?

PROBATION OFFICER SINCLAIR: Your Honor, I am not certain what will happen in this case. It will depend on how the Bureau of Prisons view this case. Your Honor could certainly make a recommendation that you view it to be related to these other cases and that it should all be considered one conduct and that you expect that the credit will be awarded as time served, but I don't know how they are going to award it individually.

THE COURT: All right.

Does the Government have a view on this?

MR. HEYMANN: I do not, no, your Honor.

THE COURT: All right. Well, I will hear from any person who is a victim who wishes to be heard in open court. Of course, I have received, in particular, two letters, one from Heartland and one from a Hannaford customer.

Is there anyone else who wishes to be heard?

(No response)

THE COURT: And seeing none, then, Mr. Gonzalez, I will hear from you.

THE DEFENDANT: Thank you, sir -- your Honor, for allowing me to address the Court today.

Your Honor, as you heard, I I am guilty of these crimes which I stand before you today to be sentenced. I am not denying this. I accept full responsibility for my actions, and, as you know, I have exploited the relationship that I had with an agency who, in my eyes, gave me a second chance at life, and for this I will ever be sorry. I have also violated the sanctity of millions of individuals throughout the United States and the sanctity of the home of my parents.

Your Honor, I plead for leniency so I may one day prove to my parents that I love them just as much as me. I understand that the road to redemption is going to be long and difficult for me, but I have tried my best to, at the very least, pave that road.

Thank you.

THE COURT: Thank you. Well, as I said when I started out, my view is that the sentence imposed by Judge Saris is a reasonable one, and I have sought to try to understand whether there are grounds to either go below it or go above it, given the particulars of this case, and there have been argued that there are grounds to do so. I think they cancel each other out.

This is a snapshot, as Mr. Heymann vividly expressed it, and, as a consequence of which, the defendant has not received an enhancement for the role in the offense. By the same token, the nature of the criminality caught in that

snapshot suggests a trajectory beyond what was before Judge Saris, a greater sophistication, a greater use of international contacts and international resources, and, consequently, a greater threat.

But, together, I think, without saying that they actually cancel each other out, my view is that I have got to treat this as a whole, and that the fair way to treat it as a whole is to impose a sentence of 18 years on the core violation and two years on the 3147, essentially -- not essentially -- it is to be concurrent with the sentence imposed by Judge Saris, precisely concurrent.

And I will make a recommendation to the Bureau of Prisons, but it is really more than a recommendation, it is a legal determination, that these are related cases that are necessarily the same, and, consequently, all of them should receive the benefit, such benefit as it is, of time served by the defendant up until this point.

I am obligated, I think, to explain my reasons, because I am departing very substantially from what the guideline would be in this case. The guideline bears emphasizing. It is 35 years. Apparently, the guideline was even more significant before Judge Saris. But what is clear is that the Guidelines, with their kind of relentless algorithms, do not capture in any nuanced way the nature of the offense here.

So, I have recourse to Section 3553, which is the larger set of principles for a sentence such as this. First, the seriousness of the offense and the nature of undermining or, at least, affirming or not undermining respect for the law. This is very sophisticated theft, but it is theft. It is no different than picking somebody's pocket in the larger calculus of culpability. It is simply that Mr. Gonzalez has extraordinary gifts, and with those extraordinary gifts he has decided to take, and he took a lot. This is a kind of crime that I am afraid we are more and more exposed to with the proliferation of technology, which requires a severe sentence, which this is, to emphasize the need for respect for the law and not in any way to depreciate the seriousness of the offense.

Now, I have in mind Mr. Gonzalez's own, personal life history, and it has been plumbed at great depths, including with two psychiatric reports, or psychosocial reports, perhaps, is another way of saying it, and I think I am familiar with the concepts involved. My own view is that there is nothing in that background which causes me to modify in any way the kind of sentence that I would impose.

Ultimately, Mr. Gonzalez, I think you understand and you recognize you are your own man; you are responsible. And displacing responsibility with therapeutic developments in the psychiatric profession does not exculpate you at all. The

Sentencing Guidelines, themselves, were meant to make sure that if we are talking about diminished mental responsibility, that it is something quite significant, and developments in perhaps DSM-V do not do that; nor do substance abuse problems, which you have had, which are real and which, apparently, you are emerging from, relieve you of responsibility. There is a fundamental of individual responsibility here.

Now, I recognize that people with your gifts sometimes find themselves obsessively dealing with the technology in a way that is asocial and frequently becomes antisocial without adequate consideration to who is being harmed and who can be harmed. I found quite compelling the letter from the elderly couple who had their Hannaford information taken. It is one thing to say that they got their money back sooner or later from some other institutions, but their lives were disrupted, and in the way of anyone who is subject to the activities of a thief in the night, they will forever be insecure.

So, these are matters of some very real consideration captured by the concept of the seriousness of the offense and not discounted by your circumstances.

I look to the question of general deterrence. It is, of course, very difficult to provide a specific figure for general deterrence; there is no grid for it. If there were, it would be as inadequate as the Guidelines are for dealing with this.

But this much we know: That there is at large in the community, maybe among younger people, a perception that there is no harm if you do not see the people who end up being affected by your technological prowess, that there are different concepts of privacy. It is, I suppose, the office of someone less than fully adult not to be aware of the consequences of their actions, but it is, consequently, very important when persons with the skills and gifts that you have receive, to the degree that there is a market for this kind of information, the message that you are going to lose the middle part of your life if you commit a crime like this.

You are in your mid-20s. You will be in your mid-40s, maybe early 40s, when you get out. That is a tremendous loss, and you will feel it, but it is in support of general deterrence so that other people similarly situated to you will understand what happens to them or what can happen to them. And these sentences can only go up, and the Guidelines, as I said, are higher than you have received. You have received very effective, I think, advocacy from Mr. Weinberg and his colleagues and a degree of humanity, frankly, from Mr. Heymann and his colleagues. But this is real time, and it is meant to deliver a message to others, and, perhaps, that is the strongest aspect of this 3553 set of considerations.

With respect to individual deterrence, I am a bit perplexed -- not perplexed -- But how long do we have to keep

you in jail? That is what it is about. Individual deterrence, in a sense, is warehousing, to keep from you from doing this crime again; warehousing and also impressing upon you the seriousness of what you have done and that gets you habituated to the idea that you should not do stuff like this. Twenty years is a long time for that. I think the message has become clear to you, and it will be internalized before the 20 years is completed, but it is important to expose people to the idea that other considerations, just deserts, seriousness of the offense, questions of general deterrence, will trump or, at least, modify and refine any sentence that also considers specific deterrence.

I turn to the question of penological benefit, and, here, it is a little difficult as well. You are such a gifted person. You have skills that I think cannot fairly be demonstrated in prison, and I share Judge Saris's view that they should not be exercised for three years out during the period of supervised release. But it seems to me that it becomes very important for you to take advantage of programs within the prison system and, particularly, questions of substance abuse. Somebody who abuses substances the way that you did or it is reported that you did does not need an AA trainer or an NA trainer to tell you that every day you get up in the morning you are an addict. You have got to face that, and the Bureau of Prisons has programs that will do that, and

you should take advantage of it. And I will recommend the 500-hour program for drug treatment there.

Prisons are a peculiar place, as you, I am sure, know. Nevertheless, it is possible to provide assistance to others. I do not mean computer training, but I do mean that, with your gifts, with your background, with your intelligence, that you can be of assistance to other inmates. And that may go to something that is touched on by the psychiatrist but not a reason for exculpation. The kind of awkward social interactions at various times in your life are really, as far as I can see, narcissistic. You have been focused on yourself and your machine, and if you take advantage of the opportunity to deal with people who have had much tougher lives than you had who are in the prison system with you, then there will be benefit from the prison experience for you.

I finally turn to the question of disparity among sentences. This is billed as the most serious of I guess what we broadly call "hacking cases" to come to the Federal Court, so there is no easy comparison. But there are other comparisons. Mr. Weinberg made reference to some of them, with some of the white-collar crime cases that just are, frankly, all over the lot, and reflect, I think, a departure from the core understanding of the Sentencing Reform Act in 1986, which was to make white-collar crime on a par with, in parity with, real crime, hard-core crime.

Judges who impose sentences tend to come from the same general background or at least have some of the same experiences and intellectual capacities and that sort of thing, and, consequently, they look out at a defendant like you with special gifts and are unlikely to impose as severe a penalty as would be imposed on someone who committed a robbery involving the same amount of money. Of course, who would ever get to do that? It would take a number of Brinks robberies to capture the amount of money that you captured through your organization.

But it seems to me that, if we are dealing with theft, which is what this is about, a sophisticated theft, then the sentence has to be high, irrespective of whether, for various reasons, other white-collar criminals have been able to obtain less-severe sentences.

So, for that reason, to affirm one of the central pillars of the Sentencing Reform Act that it should not be class-biased when we come to sentencing, that this is an appropriate sentence for you as well.

I will impose all of the conditions of supervised release that Judge Saris imposed here. I do not mean to have any daylight between the sentence that is imposed here, except as I have indicated, and that imposed by Judge Saris.

I will impose a $25,000 fine. She did; I will. The question of restitution is something that the parties will, I

hope, get back to me -- I know you will get back to Judge Saris -- with some manageable way of trying to deal with that.

There is a special assessment of $200 that must be imposed. I made clear -- I think I made clear -- but that the sentence is 18 years.

MR. WEINBERG: If your Honor please?

THE COURT: Yes.

MR. WEINBERG: And I apologize for interrupting, but Probation has advised me and I think advised the Court in its latest memo that their position is, and it is supported by some case law, that any 3147 sentence, such as that which your Honor is about to impose, will run after not only the 18-year part of your Honor's sentence but the 20-year part of Judge Saris's sentence.

So, I would ask the Court that, if the Court's intent is that 20 years is sufficient but not greater than necessary for Mr. Gonzalez, that your Honor consider putting more of the sentence on the underlying core wire and 371 conspiracies and reduce the part that's on the 3147, so that if Probation is right, and if the cases are followed, and if that is how the BOP computes his time, there would be, for instance, as Probation said -- if there was one month or they even said one day, the 20-year sentence plus one day would mean that it would be 20 years plus one day. But the way your Honor has currently formulated it, we could run the risk of a 22-year sentence.

THE COURT: Well, I understand the argument, I think. Does the Government have a view about that?

I have to say, I found these cases more than passing peculiar and not necessarily compelling, but there they are, and so I have --

MR. HEYMANN: I have got to confess, your Honor, I found them counterintuitive.

THE COURT: Yes.

MR. HEYMANN: There is an opinion by Judge Cyr. I don't know whether that's been brought to the Court's attention.

THE COURT: Judge Cyr in the Eastern District of Louisiana?

MR. HEYMANN: In Maine. That ruled to the contrary, saying that, in his opinion, it was a --

THE COURT: This is while he is sitting as a District Judge?

MR. HEYMANN: This is while he is sitting as a District Judge. If I may approach?

THE COURT: Yes.

(Document handed to the Court through the Clerk)

THE COURT: Well, let me put it in a different way. What if I am wrong and Judge Cyr is wrong, and I am wrong, and I impose this sentence? You understand what I am trying to achieve here?

MR. HEYMANN: It is also the import of the plea agreement between the parties as it says in -- does the Court have it? It's at the back there.

THE COURT: I do. Hold on a second. Let me just get it.

Go ahead.

MR. HEYMANN: The import of paragraphs 4 and 5 are that paragraphs 4 and 5 of the addendum are exactly what the Court is trying to do and was the intent of the parties, that the sentences run however -- whatever the Court sentenced, that it run fully concurrent with the sentences imposed by Judge Saris and in both the New York and Boston cases.

It puts me, as the representative of the Government, in an awkward position. It was the intent of the parties, intent of the Government and the defendant in the New Jersey agreement to do exactly what the Court is trying to do. There is a single District Court case from another District that says it can be done, and three Appellate Court cases, all of which I went back and read this morning --

THE COURT: As did I.

MR. HEYMANN: -- that say that that is not the way it works.

THE COURT: Can it be unraveled by 2255 or Rule 35 if the Bureau of Prisons, because it is another branch of the Government, decides otherwise?

MR. WEINBERG: Unfortunately, I am concerned that it might be a 2241 in the jurisdiction that Mr. Gonzalez is in, and I would have difficulties bringing him back before the Court.

THE COURT: I think that the provident thing for me to do, and I am not sure that it makes any difference, as a practical matter, to --

MR. HEYMANN: Your Honor --

THE COURT: Let me just pause for a second.

(Pause)

THE COURT: If those Court of Appeals decisions are right, the 3147 is on top of Judge Saris's cases, in any event, is it not?

MR. HEYMANN: That's correct, your Honor.

THE COURT: If I imposed a sentence of two years, two years on the substantive case and the 3147, then still the 3147 would mean that it is another two years.

MR. HEYMANN: I think to deal with this in a wholly practical matter --

THE COURT: Right.

MR. HEYMANN: -- that the Court has expressed its intention, where the rule's different, that there be a clearer sentence of two years' incarceration for the kind of conduct which the defendant did, which is to commit additional and egregious crimes while on release.

That having been said, as a practical matter, to structure it in light of this odd situation that we're in with three, separate cases in a way that imposed that two-year sentence that way, runs the risk of, in fact, creating a 22-year sentence instead of a 20-year sentence. And under those circumstances, the provident thing to do to avoid re-litigation in this District or another District is to simply do the one day on 3147 and the remainder of the sentence on the underlying offense conduct.

THE COURT: Ms. Sinclair, does that work?

PROBATION OFFICER SINCLAIR: I think that would work, your Honor, to avoid any confusion.

THE COURT: So, it becomes a sentence of 20 years and a day?

PROBATION OFFICER SINCLAIR: And just to be clear, that the judgment will indicate that the one day is specific to the 3147. I think that would resolve the issue.

THE COURT: Right.

MR. WEINBERG: And I think it does work, your Honor, and I would only ask -- maybe I'm getting greedy -- because of the uncertainty about the credits, the 15 months, I would ask the Court to reconsider a sentence of 18 years and 9 months, or if that is something --

THE COURT: I will not do that. I appreciate the practical solution that Mr. Heymann presented. I want this

sentence to be 20 years and concurrent fully, and I will reflect that in the judgment.

MR. WEINBERG: Thank you, sir.

THE COURT: And if it appears that the Bureau of Prisons is not getting the instruction, I am sure that someone will bring it to my attention here.

MR. WEINBERG: Thank you, Judge.

THE COURT: So, the sentence is 20 years on the substantive count and one day on the 3147, to match Judge Saris.

Now, are there other aspects of this that need to --

PROBATION OFFICER SINCLAIR: Your Honor, just to be clear, the judicial recommendations that you are imposing, you have the 500-hour recommendation. I believe there were a few more in Judge Saris's case.

THE COURT: I mean everything in Judge Saris's case plus the 500 hours, if it is not in.

PROBATION OFFICER SINCLAIR: It is.

THE COURT: It is in?

PROBATION OFFICER SINCLAIR: Yes, your Honor.

THE COURT: Okay. Then, as far as I am concerned, I mean to match hers, unless somebody wants me to do something different here or change it. The Judgment and Commitment Order has not been entered on the docket yet.

PROBATION OFFICER SINCLAIR: No, it has not.

THE COURT: So, I have not seen the form of it.

MR. HEYMANN: It has not yet.

THE COURT: Does anybody feel that they have not clearly understood what the sentence is here, pronounced orally?

MR. WEINBERG: Thank you very much, your Honor.

THE COURT: So, we will get that reflected as soon as we can. Thank you very much.

MR. WEINBERG: Thank you, your Honor.

THE COURT: Hold on just a second.

(The Court conferring with the Clerk)

THE COURT: One final point, Mr. Gonzalez. You should understand you do have the right of appeal. You will consider whether or not it makes any sense under these circumstances in consultation with your attorney.

We will be in recess.

THE CLERK: All rise.

THE COURT: Let me pass back Judge Cyr's decision.

MR. HEYMANN: Thank you, your Honor.

(The Honorable Court exited the courtroom at 4:30 p.m.)

(WHEREUPON, the proceedings adjourned at 4:30 p.m.)

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Unites States of America v. Albert Gonzalez, No. 1:09-cr-10382-DPW-1.

Date: March 29, 2010

/s/ Brenda K. Hancock
Brenda K. Hancock, RMR, CRR
Official Court Reporter